Supreme Court, U.S.
FILED
03-1418 APR 8 2004

No. 03-

IN THE

Supreme Court of the United States

ROBERT HARRIS, *et al.*,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION and JANE F. GARVEY, Administrator of the Federal Aviation Administration,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

JONATHAN R. SIEGEL
Professor of Law
GEORGE WASHINGTON UNIVERSITY
LAW SCHOOL
2000 H. Street, NW
Washington, D.C. 20052
(202) 994-7453

JOEL C. GLANSTEIN
Counsel of Record
DAVID M. GLANSTEIN
O'DONNELL, SCHWARTZ,
GLANSTEIN & LILLY, LLP
Attorneys for Petitioners
60 East 42nd Street
New York, NY 10165
(212) 370-5100

QUESTIONS PRESENTED FOR REVIEW

1. Whether a claimant seeking judicial review of agency action under 5 U.S.C. § 704 must demonstrate direct and immediate hardship if review is postponed, rather than the mere prospect of hardship, for the dispute to be ripe for judicial review?

2. Whether a claim for review of agency action accrues for limitations purposes only when a claimant demonstrates direct and immediate hardship or injury?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners are: ROBERT HARRIS, VICTOR CORDERO NILS MOBERG, LARRY AMBROSE, DUANE C. ATWOOD, JOHN BALBI, BRIAN BARNES, FRANCIS BASTIS, JOHN BATES, DENNIS BEARD, TOM BERTI, DAN P. BIGELOW, BRUCE E. BLAIR, JAMES BLAIR, FORREST BRADLEY, JR., DAVE BRAGGS, ROGER BRODE, CLEMENT BROWN, MICHAEL BURY, JOSE CALDERON, ROY CANTWELL, JOHN T. CARDINAL, PETE CARUSO, THOMAS CEPEDA, JR., DAVID J. CLARKE, JAMES CLARRY, JAMES R. CLEARY, ALAN COLEMAN, JOEY M. COLLIER, TOMMY H. COX, TOM ROY CRIST, RICK R. CROOK, CHARLES J. DAVIS, PETE DEMARCO, WILLIAM J. DEACY, ED DEAN, DENNIS DELEONARDIS, WILLIAM T. DEVINE, TOM DOERR, DOMINIC DINNOCENTI, DENNIS L. DONAHUE, DAN DONOVAN, DAVID E. DOWD, JACK L. DOWNIE, KNUTE DRESDEN, ROBERT DREWLO, ROBERT DUNLAP, SR., KARL EICHEN, DUANE A. ENGLE, ANDREW H. ESTERLY, JOHN REID EVANS, STEVEN FANNO, LARRY J. FITZSIMMONS, GEORGE H. GADDIE, JOHN M. GANNAWAY, BARTON E. GARY, RUDOLPH W. AYDE, THOMAS GEARY, ALBERT GEBROSKY, ROBERT GONZALEZ, LARRY G. GORE, JOHN A. GRANT, GREG HAMMONDS, GEORGE E. HAYES, JOE HEFLIN, KEN HENDERSON, JAMES A. HENRY, KEN HEWITT, RONALD HODOWAINE, ROBERT HOLOCHER, JERRY HOLT, ROBERT E. HOST, PAUL A. JAN, BRUCE JOHNSON, LOUIS TOM JOHNSON, PHILLIP W. JOHNSON, VIRGIL L. JOHNSON, WILLIAM KALLAY, JAMES P. KELLY, DIANE L. KLINE, DORI KOHLBERG, TOM LADUKE, RONALD L. LANCASTER,

GEORGE R. LECHLEITNER, KAREN LEE, GARY V. LEECH, TOM LIPSCOMB, ANNA G. LISSAK, SAMUEL A. MARRINER, HAROLD MARTIN, DAVID D. MASSON, TOM MATTHEWS, TERRENCE L. MCCLAIN, JAMES W. MCINTYRE, JOHN J. McNAUGHTON, ROY McWATT, ROBERT R. MEADOWS, JOE MERIGOLD, WILLIAM C. MERRITT, JOHN E. MISNER, KENT MITCHELL, JOHN CRAIG MOODY, TOM MOONEY, HOWARD MORRIS, ROYCE MORRISON, DONALD A. MOSHER, BETTY MURPHY, FRANK MURPHY, JAMES P. MUSONE, JOHN NEECE, MICHAEL NICE, GARY NOGLE, JOHN C. OLSEN, KENNETH OLSEN, RAMON OLIVAS, JULIO ORTIZ, DAVID PARKER, JAMES J. PASSIALES, THOMAS PESNICAK, WILLIAM T. PHILLIPS, HAROLD F. PIERCE, DALE L. PORTER, ANDREW M. PRICE, HUGH PRIOR, WILLIAM RICHARDS, JAMES RINEHART, SEFERINO RIOS, JR., DAVE ROBERTSON, GEORGE ROBINSON, RONALD J. ROBISON, THOMAS RUBRECHT, EDWARD F. RUCKER, HENRY RYTTER, CHARLES R. SALVAGGIONE, DAN A. SARUSAL, JAMES A. SCARBOROUGH, THOMAS W. SCHAEFER, DAVE J. SCHISSLER, ED SCHROER, RICHARD L. SHAFER, BOB SHAINLINE, DANIEL P. SHARKEY, JIM SHEARER, DUNCAN SHOBERG, FRANK SHOMILAK, DOUGLAS E. SHULL, BILL SIEGMUND, BOB SIEGMUND, JOHN M. SIMS, FELIX SKARPA, ERIC L. SLETTEN, FREDERICK D. SNYDER, ANGELO SORRENTINO, ANTHONY F. STANGO, PAUL L. STEVENS, MICHAEL TALLERICO, TONY TALLERICO, GABRIEL TATAY, MICHAEL TELFER, ED TOTEDO, RICK TOURIN, CECIL TROLLINGER, GLENN TRUESDELL, TONY VARDA, JULIO VEGA, ANTHONY WARD, ROY WARNER, NICHOLAS W. WILLIAMS, JOHN WINTERS, SHELBY WRIGHT, AARON V. YEARY, AL ZADOW.

Respondents

The Federal Aviation Administration is an operating administration of the U.S. Department of Transportation, a cabinet level department of the government of the United States. Jane Garvey was Administrator of the Federal Aviation Administration during the pendency of this action. Respondents Federal Aviation Administration, U.S. Department of Transportation, and Jane Garvey were the Defendants in the District Court and the Appellees in the District of Columbia Circuit Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	v
TABLE OF CITED AUTHORITIES	vii
TABLE OF APPENDICES	xii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
1. Facts.	3
2. Proceedings In The District Court.	5
3. Proceedings On Appeal.	6
REASONS FOR GRANTING THE PETITION ...	6
I. The D.C. Circuit's Opinion Involves An Important Question Of Federal Law As To What Degree of Hardship Claimants Seeking Review Of Agency Action Must Present To A Court To Satisfy The Ripeness Doctrine.	9

Contents

Page

II. There Is A Conflict Among The Circuit Courts Regarding Whether Direct And Immediate Hardship To Claimants, Or The Mere Prospect Of Hardship, Makes A Case Ripe For Judicial Review. 12

III. The D.C. Circuit's Opinion Is Incorrect As A Matter Of Law. 19

CONCLUSION 25

TABLE OF CITED AUTHORITIES

CASES: *Page*

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 9, 10, 13

Adult Video Assn. v. U.S. Dept. of Justice,
71 F.3d 563 (6th Cir. 1995) 13

Babbitt v. United Farm Workers National Union,
442 U.S. 289 (1979) 18, 21

CEC Energy Co. v. Public Service Commn. Of the Virgin Islands,
891 F.2d 1107 (3rd Cir. 1989) 18

Central and South West Services Inc. v. U.S. E.P.A.,
220 F.3d 683 (5th Cir. 2000) 16

Clean Air Implementation Project v. Environmental Prot. Agency,
150 F.3d 1200 (D.C. Cir. 1998) 10

Crown Coat Co. v. United States,
386 U.S. 503 (1967) 21-22

Doe v. County Centre,
242 F.3d 437 (3rd Cir. 2001) 18

Duke Power Co. v. Carolina Environmental Study Group,
438 U.S. 59 (1978) 21, 23

Cited Authorities

	Page
Dunn-McCampbell Royalty v. National Park Service, 112 F.3d 1283 (5th Cir. 1997)	22
Franks v. Ross, 313 F.3d 184 (4th Cir. 2002)	22
General Electric Corp. v. Environmental Protection Agency, 290 F.3d 377 (D.C. Cir. 2002)	10
Home Builders Assn. of Greater Chicago v. U.S. Army Corp of Engineers, 335 F.3d 607 (7th Cir. 2003)	11
HRI Inc., v. E.P.A., 198 F.3d 1224 (10th Cir. 2000)	17
Impro Products Inc. v. Block, 722 F.2d 845 (D.C. Cir. 1983)	22
Jobs Training & Services Inc. v. East Texas Council of Governments, 50 F.3d 1318 (5th Cir. 1995)	16
Louisiana Environmental Action Network v. Browner, 87 F.3d 1379 (D.C. Cir. 1996)	22
Lujan v. National Wildlife Federation, 497 U.S. 871 (1990)	10

Cited Authorities

Page

Massachusetts Assn. of Afro-American Police Inc. v. Boston Police Dep't.,
973 F.2d 18 (1st Cir. 1992) 14, 15, 16

Mobil Exploration & Producing U.S., Inc. v. Department of Interior,
180 F.3d 1192 (10th Cir. 1999) 17

National Assn. of Minority Contractors, Dayton v. Martinez,
248 F. Supp. 2d 679 (S.D. Ohio 2002) 13

National Park Hospitality Assn. v. Department of the Interior,
538 U.S. 803 (2003) 9, 11

North American Aviation Properties, Inc. v. National Transportation Safety Board,
94 F.3d 1029 (6th Cir. 1996) 13, 14

Norton v. Ashcroft,
298 F.3d 547 (6th Cir. 2002) 13

Ohio Forestry Assn., Inc. v. Sierra Club,
523 U.S. 726 (1998) 10, 11, 12, 17

Park Lake Resources L.L.C. v. U.S. Department of Agriculture,
197 F.3d 448 (10th Cir. 1999) 17

Cited Authorities

Page

Peachlum v. City of York, Pa.,
333 F.3d 429 (3rd Cir. 2003) 18

Peoples Rights Organization Inc. v. City of Columbus,
152 F.3d 522 (6th Cir. 1998) 13

Reno v. Catholic Social Services, Inc.,
509 U.S. 43 (1993) 7, 9

Riva v. Commonwealth of Massachusetts,
61 F.3d 1003 (1st Cir. 1995) 14

Spannus v. U.S. Dept. of Justice,
824 F.2d 52 (D.C. Cir. 1987) 21

Sprint Corp. v. F.C.C.,
331 F.3d 952 (D.C. Cir. 2003) 23

Texas Office of Public Utility Counsel v. F.C.C.,
183 F.3d 393 (5th Cir. 1999) 16

Texas v. United States,
523 U.S. 296 (1998) 11

Thomas v. Union Carbide Agricultural Prod. Co.,
473 U.S. 568 (1985) 11

Toilet Goods Assn. v. Gardner,
387 U.S. 158 (1967) 11, 17

Cited Authorities

Page

United States v. Wayne County, MI.,
280 F. Supp. 2d 726 (E.D. Mich. 2003) 13

Utah v. U.S. Department of Interior,
210 F.3d 1193 (10th Cir. 2000) 17

Western Oil and Gas Assn. v. Sonoma County,
905 F.2d 1287 (9th Cir. 1990) 18

Constitutional And Statutory Provisions:

U.S. Constitution, Article III, Section 2, Clause 1,
(U.S. Const. Art. 3, § 2, cl. 1) 1, 9

Title 5 United States Code, Section 704
(5 U.S.C. § 704 - Administrative Procedure Act)
..... i, 2, 5, 21

Title 28 United States Code, Section 2401(a)
(28 U.S.C. § 2401(a)) 3, 5, 6, 22

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The District Of Columbia Circuit Decided January 13, 2004 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The District Of Columbia Dated And Filed August 29, 2002 ..... 14a

Robert Harris et al. respectfully petition for a Writ of Certiorari to review the decision of the District of Columbia Circuit Court of Appeals in this case.

OPINIONS BELOW

The District of Columbia Circuit's opinion (App. A at 1a) is reported at *Robert Harris et al. v. Federal Aviation Administration*, 353 F.3d 1006 (D.C. Cir. 2004). The District Court's Opinion (App. B at 14a) is reported at *Robert Harris et al. v. Federal Aviation Administration*, 215 F. Supp. 2d 209 (D.D.C. 2003).

JURISDICTION

The Opinion of the United States Court of Appeals was issued on January 13, 2004. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article III, Section 2, Clause 1

Jurisdiction Of Courts.

U.S. Const. Art. 3, § 2, clause 1 provides:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -to all Cases affecting Ambassadors, other public Ministers and

> Consuls; -to all Cases of admiralty and maritime Jurisdiction, -to Controversies to which the United States shall be a Party; -to Controversies between two or more States; -between a State and Citizens of another State; -between Citizens of different States; -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Title 5 United States Code, Section 704

Actions reviewable.

5 U.S.C. § 704, provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Title 28 United States Code, Section 2401(a)

Time for commencing action against United States.

28 U.S.C. § 2401(a) provides:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

STATEMENT OF THE CASE

1. Facts.

Petitioners Robert Harris et al. are one hundred and seventy two current and retired air traffic controllers who were among the approximately eleven thousand federal air traffic controllers barred from further employment with the Federal Aviation Administration (hereinafter "FAA") in 1981 as the result of a job action. All eleven thousand barred controllers were made eligible again for FAA air traffic control positions following the issuance of a memorandum order in August 1993 by President William J. Clinton.

Following the issuance of President Clinton's memorandum order, the FAA issued Recruitment Notice 93-01 effective from September 1, 1993 to October 15, 1993.

This Notice described an opportunity for petitioners and other formerly barred controllers to reapply for FAA air traffic control work. This Notice made clear, however, that its sole purpose was to establish an "inventory of applicants" to be considered for future openings at the FAA, and that there was no guarantee, or even likelihood, that any applicant thereunder would be rehired.

There were several reasons for these limitations articulated in the Notice. First, during the time the Notice was effective the FAA was operating under an agency-wide hiring freeze. Second, once the hiring freeze ended the FAA "expect[ed] to fill only a small number of [air traffic controller] positions. . . .over the next few years." Finally, the Notice was not the sole avenue for rehire available to formerly barred air traffic controllers. The Notice also stated that the FAA anticipated filling any future air traffic controller openings from "a variety of sources."

For all of these reasons, the Notice observed, "employment opportunities are limited; there is no guarantee that candidates will be referred or selected." All the petitioners were among those formerly barred controllers eventually rehired between 1995 and 1998 pursuant to their applications under the Recruitment Notice, which stated that if any applicants were rehired, it would be at grade level GS-9.

Petitioners were among a group of approximately eight hundred formerly barred air traffic controllers who were rehired by the FAA from 1995 to 1998, fewer than one in ten of the number separated from the FAA in 1981. Unlike petitioners, some of those eight hundred came back to FAA employment through different avenues than Recruitment Notice 93-01.

Petitioners filed their complaint on March 8, 2001 under the Administrative Procedure Act, 5 U.S.C. § 704 (hereinafter "APA") to challenge as arbitrary and capricious the FAA's decision to disregard their prior highest pay grades and performance steps upon their re-employment with the FAA from 1995 to 1998 and to rehire them at grade level GS-9, a level below their previous highest grades.

The gravamen of their complaint is that the FAA arbitrarily assigned to them a grade level for trainees which did not account for their prior air traffic control experience. Also, petitioners contended the FAA's decision was arbitrary and capricious because it was contrary to established agency personnel practices mandating that employees who leave government service will be returned at their previous highest grades and steps.

2. Proceedings In The District Court.

Respondents filed a motion for dismissal or for summary judgment on March 5, 2002. The District Court entered its Memorandum Opinion and Order dismissing this case on jurisdictional grounds on August 29, 2002. The District Court concluded that petitioners' claims accrued under 28 U.S.C. § 2401(a) in 1993 upon the issuance of Recruitment Notice 93-01. The District Court reasoned that petitioners' claims accrued in 1993 because Recruitment Notice 93-01 constituted final agency action and also that petitioners' claims were ripe for review in 1993, even though the Notice expressly stated that no hiring was expected for years due to a hiring freeze and there was no guarantee of rehire for any individual or group of applicants. The District Court did not evaluate the hardship petitioners faced in 1993; it concluded that the dispute was fit for review and therefore ripe enough in 1993 to commence the running of the statute of limitations.

3. Proceedings On Appeal.

Petitioners filed their Notice of Appeal on September 24, 2002. The District of Columbia Circuit's decision affirming the District Court's decision was entered on January 13, 2004. The D.C. Circuit held that petitioners' claims accrued under 28 U.S.C. § 2401(a) in 1993 because Recruitment Notice 93-01 constituted final agency action and because their claims were ripe for review in 1993, absent any direct hardship, due to the mere "prospect of hardship" petitioners faced from the terms of the Notice if they were eventually rehired by the FAA.

REASONS FOR GRANTING THE PETITION

It is a fundamental justiciability doctrine that any cases brought before a court must be ripe for judicial review, and this doctrine is applied in cases involving the agencies of the United States and other government entities on a daily basis. Clarity and consistency among the courts in the application of the ripeness doctrine is important for efficient judicial administration.

This Court should accept this case to reaffirm that courts must look for direct hardship to parties, not the mere "prospect" of hardship if review is withheld, in order to find ripe disputes involving review of agency action. This will prevent wasted judicial resources on cases and controversies which are not ready to be adjudicated. Absent direct and immediate hardship to the parties seeking relief from the challenged agency actions, courts are faced with hypothetical disputes that need no judicial intervention. Indeed, courts often need to raise questions of ripeness concerning various disputes on their own, and this Court has addressed the

ripeness of disputes before it on its own motion. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18 (1993).

This Court's reaffirmance of its standards on the important question of what is the proper degree of hardship a claimant must demonstrate to make a case ripe for review is urgently warranted due to the importance of the ripeness doctrine to the effective administration of the courts. Letting stand the D.C. Circuit's holding in this case, that the mere "prospect of hardship" makes a case ripe for review before any litigant can know whether he will be adversely affected by the challenged agency action, invites potentially massive numbers of claims for review of agency action, most of which will likely be premature and unnecessary, that will seriously burden the federal courts.

The D.C. Circuit's opinion also must be reviewed to resolve its conflict with the holdings of at least five other Circuit Courts of Appeals, all of which require a showing of direct and immediate hardship, or at least the probable threat of immediate hardship if review is postponed, for a dispute to be ripe for review. The D.C. Circuit's decision that petitioners' claims were ripe based on the mere "prospect of hardship" from Recruitment Notice 93-01, which by its terms observed it could lead to nothing at all for petitioners, conflicts squarely with the holdings of other circuit courts of appeals on when disputes over agency action are ripe for review.

In their jurisprudence involving actions against various government agencies the First, Third, Fifth, Sixth, and Tenth Circuits have all determined that direct, immediate, or clearly predictable adverse consequences must flow from agency action for claimants to satisfy the hardship element of

ripeness, since only then will claimants face hardship if review is postponed. This approach, rather than the reasoning of the D.C. Circuit here, is more consistent with this Court's holdings that claims seeking review of agency action only accrue when claimants can demonstrate there is actual injury to their interests, thereby creating an actual controversy ripe for judicial consideration.

These Circuit Courts of Appeals have defined the hardship element of ripeness differently from the D.C. Circuit. They have properly followed this Court's holdings that an agency action is only ripe to be challenged when a claimant's conduct is altered, or when a potential claimant can predict with certainty some actual adverse impact or injury stemming from the challenged agency action.

Finally, the D.C. Circuit's opinion must be overturned because it is incorrect as a matter of law in light of this Court's precedents stating that a case is not ripe when the hardship to plaintiffs is contingent on future events which might not occur as anticipated or might not occur at all. It was also incorrect as a matter of law for the D.C. Circuit to hold that petitioners' claims accrued as ripe under the relevant statute of limitations governing their action because no direct, probable hardship existed, or present injury resulted for them, from the FAA's issuance of the Recruitment Notice in 1993. Anyone claiming direct or likely hardship or injury in 1993 would have been merely speculating that they were going to be rehired by the FAA, an event far from certain according to Recruitment Notice 93-01.

I. The D.C. Circuit's Opinion Involves An Important Question Of Federal Law As To What Degree of Hardship Claimants Seeking Review Of Agency Action Must Present To A Court To Satisfy The Ripeness Doctrine.

The issues in this case are of exceptional importance under federal law because all claimants seeking review of agency action must demonstrate their disputes are ripe for judicial consideration. In this case, none of the petitioners could predict in 1993 whether any one of them, or anyone at all, would be adversely affected by the terms of Recruitment Notice 93-01 since no one, as the FAA observed in its Recruitment Notice, had any guarantee or expectation of actually being hired. Since claimants can only seek relief from agency action when their claims are ripe for review, reaffirming the proper degree of hardship in the ripeness inquiry is important for efficient judicial administration of claims for review of agency action.

Ripeness is a prerequisite for judicial review meant "to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *National Park Hospitality Association v. Department of the Interior*, 538 U.S. 803, 808 (2003) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)). This doctrine stems both from Article III of the Constitution and from "prudential reasons" not to exercise jurisdiction. *Id.* at 808, quoting *Reno*, *supra*, at 57.

Controversies abound concerning formal agency actions, such as rulemaking and adjudication, as well as informal agency directives or policy statements. To determine whether a controversy is ripe for judicial review, this Court has dictated that courts must examine "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs*, *supra*, at 148. This Court has defined this inquiry to involve consideration of "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 733-34 (1998). This Court has also held that an important element of the ripeness inquiry is that claimants demonstrate "significant practical harm" to the interests they seek to protect at the time they seek review of the challenged agency action. *Id.* at 733.

Fitness must be determined by assessing whether the controversy is purely abstract, or whether judicial resolution would benefit from "concrete action applying the regulation to the [claimants] situation in a fashion that harms. . . .". *Clean Air Implementation Project v. Environmental Protection Agency*, 150 F.3d 1200, 1204 (D.C. Cir. 1998) (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990)). Once fitness is established the hardship of withholding review must also be addressed, except where Congress has declared a preference for immediacy of review of agency action. *General Electric Corp. v. Environmental Protection Agency*, 290 F.3d 377, 381 (D.C. Cir. 2002).

This Court has rejected the notion that claimants with only speculative injuries or hardship present disputes ripe for judicial

review. *Texas v. United States*, 523 U.S. 296, 300-01 (1998). As such, some circuit courts of appeals properly reject claims that disputes are ripe where, as here, the claimants could only show the harm to them from withholding review was purely speculative. *Home Builders Assn. of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 619 (7th Cir. 2003).

The hardship element of ripeness has been further defined to mean that a claimant's action is ripe for review when hardship is demonstrated by its impact on the claimant's conduct. Agency action which is not felt immediately, but rather has no effect on the day to day affairs of those subject to it, is less likely to be ripe for review. *Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 164 (1967).

As such, this Court has also held that a showing of hardship from postponing review is made where agency action creates "adverse effects of a strictly legal kind" and is not present where the agency action "do[es] not command anyone to do anything or to refrain from doing anything; [it] do[es] not grant, withhold, or modify any formal legal license, power, or authority; [it] does not subject anyone to any civil or criminal liability; [and it] create[s] no legal rights or obligations." *National Park Hospitality Assn.*, *supra*, at 808 (quoting *Ohio Forestry Assn.*, *supra*, at 734). Where a party's claims turn on "contingent future events that may not occur as anticipated, or indeed may not occur at all," a case is not ripe for judicial review. *Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568, 580-81 (1985).

None of the petitioners or any of the other eleven thousand former controllers had any reason to seek court review in 1993 since none of them were adversely affected by the Recruitment Notice until fewer than one in ten were

offered reemployment years later. Any practical hardship or injury to claimants was therefore contingent on their being rehired, which only occurred years after the Notice was issued.

The D.C. Circuit's holding will undoubtedly propel numerous claimants into courts to challenge agency actions, absent any direct or immediate hardship to them if review is postponed, based on the mere "prospect of hardship." This will not only entangle the courts in unnecessary and burdensome litigation, it will likely delay and interfere with agency decision making, which in many of these cases will be incomplete, due to the need to address ongoing litigation. For all these reasons, this issue of what degree of hardship from agency action must exist to present a claim ripe for judicial review is important for this Court to resolve.

II. There Is A Conflict Among The Circuit Courts Regarding Whether Direct And Immediate Hardship To Claimants, Or The Mere Prospect Of Hardship, Makes A Case Ripe For Judicial Review.

The issues raised in this case are also of exceptional importance because there is a split among the Circuit Courts of Appeals regarding what degree of hardship claimants must demonstrate they will suffer if review of challenged agency action is postponed. This Court has held ripeness involves consideration of whether delay in review will cause significant hardship to claimants, whether judicial intervention will interfere with further agency action, and whether the courts would benefit from further factual development. *Ohio Forestry Assn.*, *supra*, at 734. The hardship element of the ripeness test has been applied in different ways in different circuit courts, with some courts

looking for direct and immediate hardship to litigants from delay in their challenges to agency actions. The D.C. Circuit here looked only at whether the petitioners faced the mere "prospect of hardship" in holding petitioners' claims were ripe for review, without considering the significance of the hardship or the likelihood it would occur.

In contrast, the Sixth Circuit has found claims for review of government action ripe only when claimants demonstrate: (1) hardship to them if review is postponed until enforcement of an agency decision; (2) a likelihood that the harm they allege will come to pass; and (3) facts that are sufficiently developed for judicial review. *Norton v. Ashcroft*, 298 F.3d 547, 554-55 (6th Cir. 2002); *Peoples Rights Organization Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998); *Adult Video Assn. v. U.S. Dept. of Justice*, 71 F.3d 563, 568 (6th Cir. 1995). These requirements have led district courts in the Sixth Circuit to conclude litigants present unripe claims where they do not demonstrate any concrete hardship or direct impact will ensue from delayed review of the complained of government action. *United States v. Wayne County, MI.*, 280 F. Supp. 2d 726, 729-30 (E.D. Mich. 2003); *National Association of Minority Contractors, Dayton v. Martinez*, 248 F. Supp. 2d 679, 687-89 (S.D. Ohio 2002).

Also, in *North American Aviation Properties, Inc. v. National Transportation Safety Board*, 94 F.3d 1029, 1031 (6th Cir. 1996) the Sixth Circuit dealt with a petition seeking review of informal revisions to agency regulations, but the impact of these revised rules on the parties were contingent on future events. Citing *Abbott Labs, supra*, the Sixth Circuit found the petition unripe for judicial review because the changed rules presented no immediate hardship and because they might "never be applied adversely to petitioner."

Id. at 1031. By contrast, the D.C. Circuit deemed the mere "prospect" of hardship made the instant dispute ripe absent any consideration of the probability that adverse affects would be felt by the petitioners.

The First Circuit, also contrary to the D.C. Circuit, examines ripeness in terms of direct and immediate hardship to a claimant if review is withheld, but the First Circuit also balances hardship against the practical usefulness of "setting the underlying controversy to rest" and also, unlike the D.C. Circuit, looks at whether the hardship is "sufficiently probable." *Riva v. Commonwealth of Massachusetts*, 61 F.3d 1003, 1010 (1st Cir. 1995). The First Circuit finds that where a "statute's operation is inevitable (or nearly so)," and where it "may impose sufficiently serious collateral injuries," sufficient hardship exists to make government action ripe for judicial review. *Id.*

In the public employment context the First Circuit has found unripe claims for relief based on mere "expectations" of hiring or promotion, because in those circumstances claimants cannot demonstrate any probable hardship if review is delayed until hiring decisions are made. In *Massachusetts Assn. of Afro-American Police Inc. v. Boston Police Dep't.* 973 F.2d 18, 20-21 (1st Cir. 1992), the claims of non-minority police officers that they would suffer adverse impact from a consent decree governing promotions were deemed unripe for review because:

> [T]he [appellants] alleged injury is contingent upon events that may not occur as anticipated or may not occur at all. Any injury to [appellants] is contingent upon [hiring and promotion] from the 1991 lists.
>
> * * *

> [T]he [appellants] can hardly claim hardship since the injury . . . allege[d] cannot yet be proven and may never occur. If contingent events ever do occur, the [appellants] may then ask the district court to hear its challenge.

Id. at 20-21. In *Boston Police* the Boston Police Department had entered into a consent decree in which it agreed not to award promotions to more than a certain number of officers without first obtaining consent from the court or the minority officers organization which had brought the action leading to the consent decree. In rejecting as unripe certain non-minority officers' claims of impairment of their rights to promotional opportunities, the First Circuit held that no ripe dispute existed because none of the non-minority police officers who anticipated being passed over for promotions due to the consent decree could demonstrate any adverse affect from the decree's hiring preferences until job vacancies opened to be filled. Until vacancies opened, the First Circuit reasoned, no ripe controversy existed since no officers were yet being disadvantaged by the decree's hiring preferences that would govern promotions in the police department.

Similarly, petitioners' applications for reemployment with the FAA through Recruitment Notice 93-01 created no direct or probable hardship or injury in 1993 when they were included among the FAA's new "inventory of applicants" for future openings that were not yet being filled. Other contingent events, specifically FAA hiring decisions, had to occur before anyone could present a dispute ripe for judicial review by claiming adverse affects from the 1993 Recruitment Notice.

The reasoning of the First Circuit in *Boston Police* starkly conflicts with the D.C. Circuit's opinion in this case that the prospect of hardship in prospective FAA employment created a ripe dispute in 1993 absent predictable job openings that the petitioners would fill. Absent any present expectation of employment by an agency, under the First Circuit's approach claims concerning agency hiring do not accrue.

The D.C. Circuit's gossamer treatment of hardship in its ripeness inquiry is also in conflict with the degree of hardship in the ripeness inquiries applied in the Fifth and Tenth Circuit Courts of Appeals, both of which require claimants to demonstrate "direct and immediate impact" to their interests if review is postponed. The Fifth Circuit's ripeness inquiry in administrative cases, unlike the D.C. Circuit's test, requires a claimant to demonstrate direct and immediate hardship stemming from the complained of agency action. *Texas Office of Public Utility Counsel v. F.C.C.*, 183 F.3d 393, 410 n.11 (5th Cir. 1999); *Jobs Training & Services Inc. v. East Texas Council of Governments*, 50 F.3d 1318, 1325 (5th Cir. 1995).

The Fifth Circuit has also held that claimants in administrative cases must, even when the issues are "purely legal," show some hardship that is not speculative in order to establish ripeness. *Central and South West Services, Inc. v. U.S. E.P.A.*, 220 F.3d 683, 690 (5th Cir. 2000). The Fifth Circuit's standard is clearly at odds with the D.C. Circuit's holding that petitioners' claims were ripe for review in 1993 based on their mere "prospect" of hardship if rehired pursuant to the 1993 Recruitment Notice, which by its express terms was far from certain to occur.

The Tenth Circuit Court of Appeals has closely followed the approach of the Fifth Circuit in administrative cases,

requiring as part of its ripeness inquiry that claimants demonstrate that the agency action "has or will have a direct and immediate impact upon the plaintiff." *Mobil Exploration & Producing U.S., Inc. v. Department of Interior*, 180 F.3d 1192, 1197 (10th Cir. 1999). In placing such a heavy emphasis on the showing of direct hardship a claimant must demonstrate, the Tenth Circuit has frequently held that claims for review of agency action are not ripe unless petitioning claimants will suffer significant hardship if review is withheld. *Utah v. U.S. Department of the Interior*, 210 F.3d 1193, 1196 (10th Cir. 2000) (citing *Ohio Forestry*, *supra*, at 733); *HRI Inc. v. E.P.A.*, 198 F.3d 1224, 1236-37 (10th Cir. 2000).

The Tenth Circuit in *Park Lake Resources L.L.C. v. U.S. Department of Agriculture*, 197 F.3d 448, 452-53 (10th Cir. 1999) further defined its hardship inquiry for determining the ripeness of a challenge to agency action as "tak[ing] into account financial, operational, and legal consequences flowing from the agency action" and whether a claimant "felt any effects" from the agency action. The court further stated:

> In this case, although the [agency action] has been 'formalized,' Park Lane will not feel any effects of the [action] until the Forest Service. . . . requires any restrictions upon its [conduct]. Waiting until that occurs preserves and protects the administrative process and meets our prudential concerns about interfering with that process or deciding hypothetical scenarios.

Id. (citing *Toilet Goods Assn.*, *supra*, at 163-65). Other courts also characterize the degree of hardship necessary to demonstrate ripeness as "direct and immediate hardship . . .

entail[ing] more than possible financial loss" if review is withheld. *Western Oil and Gas Assn. v. Sonoma County*, 905 F.2d 1287, 1291 (9th Cir. 1990). This approach starkly contrasts with the D.C. Circuit's reasoning that the speculative prospect of financial loss to petitioners and thousands of other applicants from the 1993 Recruitment Notice, in the event they were actually rehired someday at the lower pay grade, made their claims ripe in 1993 absent any immediate effect on petitioners.

Finally, the Third Circuit Court of Appeals also defines its ripeness inquiry for review of administrative action to require a showing of direct and immediate hardship to claimants if review is withheld. In *Peachlum v. City of York, Pa.*, 333 F.3d 429, 433-34 (3d Cir. 2003) the court stated it requires that a party demonstrate it is "genuinely aggrieved so as to avoid expenditure of judicial resources on matters which have caused harm to no one." *Id.* (citing *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979)).

Here another circuit court, unlike the D.C. Circuit, requires a showing of direct and immediate hardship to a party for a challenge to agency action to be ripe for review. See also *Doe v. County Centre*, 242 F.3d 437, 453 (3d Cir. 2001); *CEC Energy Co. v. Public Service Commn. of the Virgin Islands*, 891 F.2d 1107, 1110-11 (3d Cir. 1989). The Third Circuit has also, unlike the D.C. Circuit, followed the counsel of this Court to avoid wasting judicial resources on hypothetical controversies involving merely speculative hardship or injury to the parties seeking judicial intervention.

The D.C. Circuit's holding here that the mere "prospect of hardship" is sufficient, assuming fitness, to make a claim

ripe for review is therefore in direct conflict with the degree of hardship required in the ripeness tests applied by other Circuit Courts of Appeals as well as the standard for ripeness articulated in the prior holdings of this Court. The D.C. Circuit's opinion will cause confusion as to when claims accrue for review of agency action, and will result in more litigants bringing cases prematurely. For these reasons, review is necessary to reaffirm the proper degree of hardship which makes ripe a claim for review of agency action and to eliminate this conflict among the circuit courts.

III. The D.C. Circuit's Opinion Is Incorrect As A Matter Of Law.

The D.C. Circuit's holding that petitioners' claims were ripe in 1993 and its affirmance of the dismissal of petitioners' challenge to agency action as time barred were incorrect as a matter of law. The D.C. Circuit ignored this Court's precedents concerning when a case seeking review of agency action becomes ripe for review, which dictate that claims are not ripe absent actual probable hardship or injury.

The D.C. Circuit's holding that petitioners' claims were ripe for review in 1993, when none of the eleven thousand formerly barred air traffic controllers had any direct hardship or present injury stemming from Recruitment Notice 93-01, ignored the ripeness standards set forth repeatedly by this Court. As discussed, *supra*, in Point I, this Court has held that only when the effects of agency action are felt by the claimants in a concrete way by compelling action or inaction, and postponing review would cause imminent hardship or injury, is the challenged agency action ripe for review. This Court has also repeatedly held that a case is ripe for review only when claimants can demonstrate direct and

immediate hardship will result if review is postponed, and that fitness alone is not sufficient to create a ripe dispute.

Under the D.C. Circuit's reasoning that the mere "prospect of hardship" in 1993 was sufficient to make the instant matter ripe for review, all eleven thousand formerly barred air traffic controllers would have had ripe claims for review of agency action in 1993 based on the pure speculation that they would, if selected someday for rehire pursuant to Recruitment Notice 93-01, be adversely affected. Petitioners' "prospect of hardship" was clearly subject to contingent events, namely FAA hiring decisions, and did not meet this Court's test for ripe controversies since no actual injury could be predicted in 1993. Due to this clearly erroneous holding by the D.C. Circuit, this Court must now reaffirm that claimants, in order to show agency action is ripe for judicial consideration, must demonstrate direct and immediate hardship to them if review of the challenged agency action is postponed.

Examination of actual injury to petitioners in 1993 was also not done by the D.C. Circuit as part of its ripeness inquiry and this was incorrect as a matter of law. The D.C. Circuit erroneously ignored the requirement that petitioners had to show direct hardship or injury stemming from postponing review for their claims to have been ripe in 1993, since without a showing of present injury petitioners could not have maintained actions in court in 1993.

This Court has addressed the justiciability of disputes challenging government action as requiring claimants to demonstrate, without distinguishing between ripeness and the other elements of justiciability, "a realistic danger of sustaining a direct injury as a result of [government action]."

Babbitt, *supra*, at 297-298. Also, in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 81 (1978), this Court addressed ripeness by holding there must be a showing of injury for claimants to demonstrate they can maintain an action in court. This Court in *Duke Power Co.* characterized its ripeness inquiry as requiring that claimants demonstrate that delayed relief would "foreclose any relief from the present injury." *Id.* Therefore, absent present injury and/or direct hardship from an agency action, a claimant has no real controversy to present for judicial resolution and hence no ripe dispute to maintain in court. The D.C. Circuit's holding that the mere "prospect of hardship" in 1993 demonstrated a ripe dispute is therefore incorrect and contrary to these precedents.

The D.C. Circuit, by incorrectly holding petitioners' claims were ripe for review in 1993, also incorrectly held that their claims seeking review of agency action under 5 U.S.C. § 704 accrued in 1993 and were therefore time barred. The D.C. Circuit ignored the well settled principle that statutes of limitations only commence when claimants can bring and maintain an action in court. The D.C. Circuit essentially concluded here it was not necessary for petitioners to show any actual hardship or present injury in 1993 for their claims to have accrued, merely the prospect of hardship. As a matter of law this was erroneous given, as frequently noted by this Court, the need for a demonstration of hardship and/or injury for claims to be ripe for judicial review.

The statute of limitations for review of agency action commences "as soon as (but not before) the person challenging the agency action can institute and maintain a suit in court." *Spannus v. U.S. Dept. of Justice*, 824 F.2d 52, 56 (D.C. Cir. 1987) (citing *Crown Coat Co. v. United States*,

386 U.S. 503, 510-11 (1967)). In *Impro Products Inc. v. Block*, 722 F.2d 845, 850 (D.C. Cir. 1983), a case relied on by the D.C. Circuit in this matter, the D.C. Circuit found a claim for review of agency action was time barred after having accrued under 28 U.S.C. § 2401(a) when "all statutorily required or permitted agency review ha[d] been exhausted" and, where none was available, when the agency action "occurred." Though *Impro Products* makes no mention of hardship or ripeness, it observes that a challenge to agency action accrues only when the claimant's right to go to court is "perfected," *Id.* at 850, which can only occur when a plaintiff's claim is ripe for judicial review.

The D.C. Circuit has since expressly held that "until [a] claim ripens, [a] statutory time bar [does] not begin to run" concerning a challenge to agency action. *Louisiana Environmental Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996). Other circuit courts of appeals have also found that claims must be ripe to commence the running of statutes of limitations governing challenged agency actions and, unlike the D.C. Circuit in its reliance on *Impro Products* here, those courts have properly found claims ripe only when there "[is] no obvious factual contingency that puts a particular injury in doubt." *Franks v. Ross*, 313 F.3d 184, 195-96 n.13 (4th Cir. 2002).

The D.C. Circuit held here that the prospect of hardship alone was sufficient for petitioners' claims to accrue as ripe in 1993. But as noted above the prospect of hardship is not the same as the injury which is necessary to begin the running of the statute of limitations for review of agency action under 28 U.S.C. § 2401(a), which occurs only when agency regulations or actions are adversely applied to claimants. *Dunn-McCampbell Royalty v. National Park Service*, 112 F.3d 1283, 1287-88 (5th Cir. 1997).

The D.C. Circuit relied in part here on its decision in *Sprint Corp. v. F.C.C.*, 331 F.3d 952, 956-58 (D.C. Cir. 2003), a case which found unripe a dispute where delay would cause no injury or hardship to plaintiffs, in concluding postponement of judicial review was unnecessary in 1993. But as set forth in *Duke Power*, *supra*, at 82, prudential concerns against postponing relief must be balanced against some "present" injury to claimants if review is postponed, and only when there is such injury are claims for review of agency action ripe for judicial consideration.

The D.C. Circuit, by deciding here that no direct hardship or injury was required for petitioners' claims to accrue as ripe in 1993, therefore erroneously ignored this strong relation between direct hardship and the existence of present injury necessary for demonstrating ripeness. The "prospect of hardship" does not equate to the present injury this Court has concluded must be demonstrated to make a claim ripe for judicial review, particularly since courts must only resolve actual controversies.

In this case the D.C. Circuit has ignored this Court's prior dictates on the interrelation between hardship and injury by concluding that the mere "prospect of hardship" made this dispute ripe for judicial consideration in 1993 and started the running of the statute of limitations on petitioners' claims in 1993. The D.C. Circuit's reasoning here overlooks how any formerly barred controller would have had any direct hardship or present injury in 1993 to demonstrate a ripe dispute which could have been maintained in court in 1993. None of the thousands of formerly barred air traffic controllers who applied for reinstatement could predict in 1993 who among them would be rehired, or under what other hiring procedures they might be rehired, so no one could

have claimed any predictable hardship or injury in 1993 to demonstrate an actual controversy ripe for judicial consideration.

Indeed, the few formerly barred air traffic controllers who were eventually rehired under the 1993 Recruitment Notice did not face any injury or hardship in 1993 nor could they predict who or if anyone among them would be rehired and thereby be adversely affected by the terms of the Recruitment Notice. Had anyone brought suit in 1993, they could not have demonstrated hardship or injury from the Recruitment Notice to show their claims were anything but hypothetical until FAA hiring decisions were made.

The 1993 Recruitment Notice expressly stated that its sole purpose was to establish an inventory of applicants for future openings which, due to a hiring freeze at the FAA, were not going to occur in the foreseeable future and there were no guarantees of rehire. The Notice was simply an invitation to reapply for employment,[1] which was declined by many of the formerly barred controllers and by others who were rehired by the FAA through other avenues. Until someone was selected and then rehired under the terms

---

1. In its Opinion the D.C. Circuit also mistakenly characterized Recruitment Notice 93-01 as a contractual commitment, stating it represented "the FAA's formal offer of employment to hire former PATCO controllers at the GS-9 level, an offer which the appellants accepted pursuant to its terms by applying during the 1993 six week period." Given that the Notice expressly stated it presented "no guarantee" of employment to candidates, no consideration was exchanged, and also hundreds of applicants were never rehired, these events could not have constituted the necessary offer and acceptance to clearly establish "[petitioners'] legal rights as well as the obligations of the FAA." Appendix A. at 9a, 12a.

of the Notice, none of the formerly barred controllers could claim any direct, probable hardship or present injury to their interests stemming from the Notice. For any petitioner to have brought a claim for review of agency action in 1993 based on the terms of Recruitment Notice 93-01, which made it very clear that there was no guarantee of rehire and that no applicant should expect to return to FAA employment, would have been speculative at best. Such speculative claims do not demonstrate actual controversies ripe for judicial consideration.

CONCLUSION

For the reasons set forth herein and for such other reasons as this Court deems just and appropriate, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Of Counsel:

JONATHAN R. SIEGEL
Professor of Law
GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL
2000 H. Street, NW
Washington, D.C. 20052
(202) 994-7453

JOEL C. GLANSTEIN
Counsel of Record
DAVID M. GLANSTEIN
O'DONNELL, SCHWARTZ,
GLANSTEIN & LILLY, LLP
Attorneys for Petitioners
60 East 42nd Street
New York, NY 10165
(212) 370-5100

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED JANUARY 13, 2004

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

Argued October 10, 2003 Decided January 13, 2004

No. 02-5304

ROBERT HARRIS, *ET AL.*,

APPELLANTS

v.

FEDERAL AVIATION ADMINISTRATION AND
JANE F. GARVEY, ADMINISTRATOR OF THE
FEDERAL AVIATION ADMINISTRATION,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 01cv00503)

Before: HENDERSON, TATEL and ROBERTS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: In 1981, most of the air traffic controllers who were members of the Professional Air Traffic Controllers Organization (PATCO)

illegally went on strike from their jobs with the Federal Aviation Administration (FAA). *See* 5 U.S.C. § 7311(3). President Reagan responded by firing those who refused to return to work and banned them from future FAA employment. Twelve years later, in August 1993, the ban was lifted. Pursuant to that directive, the FAA published Recruitment Notice 93-01 (Recruitment Notice or Notice). The Notice provided an avenue for former PATCO controllers to apply to work at the FAA and specified a GS-9 grade-level, with that grade level's corresponding salary range, for any hirees.

Robert Harris and the other 171 appellants are former PATCO controllers who were hired by the FAA pursuant to the Recruitment Notice. In 2001, they filed suit under the Administrative Procedure Act (APA), 5 U.S.C. § 704, claiming that the FAA's decision to hire them at the GS-9 level and corresponding salary range - as opposed to their prior, pre-termination grade-levels and corresponding salary ranges - was arbitrary and capricious. The district court dismissed their case for lack of subject matter jurisdiction, concluding that they had failed to bring their claim within the six-year statute of limitations set forth in 28 U.S.C. § 2401(a). In doing so, the district court found that the Recruitment Notice constituted "final agency action" for the purpose of the appellants' APA claim and that their case would have been ripe for review when the Notice was published in 1993. The appellants contend that the district court erred on both grounds. We disagree and affirm.

Appendix A

I. BACKGROUND

On August 3, 1981, after several months of negotiation and years of disputes with the FAA, several thousand air traffic controllers who were members of the PATCO went on strike from their jobs with the federal government. In response, President Reagan demanded that they return to work within 48 hours or risk losing their jobs. Over 11,000 controllers refused to do so, so President Reagan fired them and banned them from returning to work at the FAA. More than twelve years later, on August 12, 1993, the lifetime ban was lifted. Shortly thereafter, the FAA issued the Recruitment Notice.

The Notice formally alerted former PATCO controllers that they were eligible for "reinstatement" at the FAA and provided them a specific avenue to apply. J.A. 53. Controller positions, the Notice stated, would be filled as vacancies occurred and, although the FAA expected to add only a few controllers from various sources over the next few years,[1] by the Notice it was "establishing an inventory of applicants who have reinstatement and transfer eligibility." *Id.* According to the Notice, applicants would be initially hired at the GS-9 grade level, with a corresponding salary of

---

1. The Notice was not the only avenue by which a former PATCO controller could return to the FAA. Regional FAA offices also published their own recruitment notices, which established their own particular salary ranges. Similarly, at least as early as 1985, former PATCO controllers could apply for employment at certain Department of Defense (DOD) facilities, proceed through DOD pay scales, and (after the 1993 directive) transfer to the FAA and retain their equivalent DOD grade level and corresponding salary. J.A. 25-27, 157.

between $27,789 and $36,123. Internal FAA documents explained that hiring would take place at the GS-9 level because the former PATCO controllers would need modified training to learn new air traffic control systems; they further explained that a controller's salary within that range would be based on his penultimate salary at the time he was fired. "Advancement above [the] GS-9 [grade level]," the Notice declared, would "be based upon successful completion of training and/or certification requirements for the next higher grade and applicable time-in-grade requirements." *Id.*

The appellants are 172 current and retired former PATCO controllers who were hired by the FAA between 1995 and 1998 pursuant to the Recruitment Notice.[2] In 2001, they brought suit under the APA "to challenge as arbitrary and capricious the FAA's decision to disregard [their] prior highest pay grades and performance steps upon their reemployment with the FAA from 1995 to 1998." Appellants' Br. at 3. They claim that the FAA should have hired them at their prior, pre-termination grade[3] - and at the appropriate accompanying salary - and not at the GS-9 level and at a salary within its range.

---

2. As the district court noted, the Notice was undated but stated that it was "open" for six weeks only - from September 1, 1993 to October 15, 1993. *Id.* The appellants do not contest the fact that they applied for employment at the FAA pursuant to the Notice during that time frame.

3. At least one of the appellants was at the GS-14 grade level when he was fired and if hired at that level would have received a significantly greater salary. J.A. 241.

Appendix A

In the district court, the FAA moved to dismiss the case on the grounds that the appellants' claims were time barred, that they had failed to exhaust their administrative remedies and that they had failed to state a claim. Concluding that the Recruitment Notice constituted the final agency action under the APA, the court held that the appellants did not meet the six-year statute of limitations because their claims were not filed until 2001. The court also rejected the appellants' claim that their claims did not become ripe for review until the FAA hired them beginning in 1995, believing that their APA claim was ripe for review in 1993.

On appeal, the appellants argue that the district court erred in two ways. First, they claim that the Recruitment Notice could not constitute final agency action because the FAA's hiring process was incomplete and because the Notice had no immediate impact on them until they were hired. Second, they renew their claim that even if the Notice was a final agency action, the APA's statute of limitations did not, and could not, begin to run until their claim became ripe for judicial review, which they contend was not until they were hired beginning in 1995. The FAA counters that the district court's conclusions were correct, but that even if they were not, this court should affirm the dismissal on other grounds, including: (1) the appellants failed to show that they were aggrieved; (2) they had alternative remedies and thus no cause of action under the APA; (3) they failed to exhaust their alternative administrative remedies; and (4) they failed to show that the FAA's decision to hire former PATCO controllers at the GS-9 level as opposed to their prior grade levels was arbitrary or capricious.

Appendix A

II. DISCUSSION

Section 704 of the APA provides for judicial review of "final agency action." 5 U.S.C. § 704. Unless another statute prescribes otherwise, a suit challenging final agency action pursuant to section 704 must be commenced within six years after the right of action first accrues. 28 U.S.C. § 2401(a);[4] *Sendra Corp. v. Magaw*, 111 F.3d 162, 165 (D.C. Cir. 1997). The right of action first accrues on the date of the final agency action. *Id.*; *see Impro Prods., Inc. v. Block*, 722 F.2d 845, 850-51 (D.C. Cir. 1983) ("In this case, where no formal review procedures existed, the cause of action accrued when the agency action occurred.").

The appellants first contend that the district court erred because the Recruitment Notice did not constitute final agency action. The United States Supreme Court explained in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), that:

> [a]s a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) - it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from

4. "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a).

which "legal consequences will flow," *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970).

See Domestic Secs., Inc. v. SEC, 333 F.3d 239, 246 (D.C. Cir. 2003). The appellants contend that the Recruitment Notice fails on both counts. With regard to the first condition, they make two arguments. First, relying on *Fourth Branch Assocs. (Mechanicville) v. FERC*, 253 F.3d 741, 746 (D.C. Cir. 2001), they claim that the Notice manifested only the FAA's future intent to hire former PATCO controllers. Second, they contend that the FAA was still formulating its hiring process with regard to former PATCO controllers after publication of the Notice and that the FAA subsequently modified its policies in 1996 when it allowed former PATCO controllers who were employed by DOD to transfer to the FAA and maintain their DOD grade levels.

Neither argument holds water. In *Fourth Branch Assocs.*, we rejected the petitioner's argument that FERC's decision to *initiate* a surrender proceeding - in which FERC explicitly stated that it had made "no final decision" regarding the outcome of the proceeding - constituted a final agency action. 253 F.3d at 746. In contrast, while the Notice here qualified the date, if ever, on which a former PATCO controller might be hired - stating that "the FAA expects to fill only a small number of [controller] positions from a variety of sources over the next few years," that "employment opportunities are limited" and that it was therefore "establishing an inventory of applicants who have reinstatement and transfer eligibility," J.A. 53 - it stated categorically that, when such hiring occurred pursuant to the Notice, it would be at the

GS-9 grade level and at a corresponding salary.[5] That declaration constitutes an "unequivocal statement of the agency's position" sufficient to meet the first requisite for final agency action. *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 734 (D.C. Cir. 2003).

The appellants also claim that, even if the Notice itself was initially definitive with regard to the grade level and salary of former PATCO controllers hired pursuant to it, the FAA modified its hiring policy after the Notice's publication. We have previously observed that "[i]f for any reason the agency reopens a matter and, after reconsideration, issues a new and final order, that order is reviewable on its merits, even though the agency merely reaffirms its original decision." *Sendra Corp.*, 111 F.3d at 167. Here, however, the evidence to which the appellants point for support does not indicate that the FAA in any way altered or reconsidered its decision regarding the grade and salary of those former PATCO controllers hired pursuant to the Recruitment Notice. FAA Order 3300.30, which issued on December 22, 1993, makes clear that any former PATCO controller applying pursuant to the Notice would not be hired at the grade level he held before the strike; rather it confirms the Notice by stating that such hiree would initially be paid at the GS-9 grade level at a salary corresponding as closely as possible to his penultimate, pre-termination salary. J.A. 60. Furthermore, the fact that some former PATCO controllers

---

5. Indeed, the Notice explained that "[a]dvancement above GS-9" would be available to applicants - who after all had not served as controllers for 12 years - "based upon successful completion of training and/or certification requirements for the next higher grade." *Id.*

who worked as controllers at DOD in 1996 and who subsequently transferred to the FAA (but not pursuant to the Notice) were able to maintain their then-current grade level does not mean that the FAA altered the Notice's offer to hire at the GS-9 level former PATCO controllers who required retraining. Indeed, that the FAA continued to hire the appellants through 1998 at the GS-9 level pursuant to the Notice manifests that the FAA continued to enforce it as written.

The appellants next claim that the district court erred in concluding the Notice constituted final agency action because it had no "immediate impact or direct legal consequences" on any former controllers until they were in fact hired by the FAA. Appellants' Br. at 12. The test for finality, however, is not so narrow - it is met if "the action [is] one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (quotations and citations omitted); *see Reliable Automatic Sprinkler*, 324 F.3d at 731 ("Agency action is considered final to the extent it imposes an obligation, denies a right, or fixes some legal relationship." (citing *Role Models Am., Inc. v. White*, 317 F.3d 327, 331-32 (D.C. Cir. 2003))). As the district court observed, the Notice constituted the FAA's formal offer of employment to hire former PATCO controllers at the GS-9 level, an offer which the appellants accepted pursuant to its terms by applying during the *1993* six-week period. The hiring of the appellants from 1995 to 1998 at the GS-9 level simply implemented the FAA's decision which was made in 1993 and spelled out in the Notice. *See Impro Prods.*, 722 F.2d at 850 (agency's renewal of earlier decision - periodic redistribution of reprints of articles allegedly containing false information - did not restart statute of limitations).

The appellants alternatively contend that, even if the Notice constituted final agency action, the district court erred in dismissing their law suit because the six-year statute of limitations did not begin to run until after they were hired. Had they brought their claim in 1993, the appellants contend, the district court would have dismissed their case for lack of ripeness. We have declined previously to consider an after-the-fact invocation of the ripeness doctrine to defeat a statute of limitations, although not in the context of an APA claim. *See, e.g., Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 912-14 (D.C. Cir. 1985) (CERCLA claim brought too late to meet ninety-day statute of limitations and petitioner's ripeness argument rejected). Nevertheless, we believe that the appellants' claim *was* ripe for review in 1993.

The ripeness inquiry requires a court to look both to "the fitness of the issues for judicial review and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 105 (1977); *see Sprint Corp. v. FCC*, 331 F.3d 952, 956-58 (D.C. Cir. 2003). "In determining the fitness of an issue for judicial review we look to see whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998) (internal quotation omitted). We have already determined that the Recruitment Notice constituted final agency action; nevertheless the appellants argue that their case was not ripe for judicial review until they were hired because the FAA's decision was not sufficiently crystallized and because they had not yet

suffered any "direct hardship." Appellants' Br. at 19. As we explained in *Sprint Corp.*, however, "the question of whether an agency decision is arbitrary and capricious is a purely legal question," and "[f]itness . . . is more likely to be found where 'the issue tendered is a purely legal one.' " 331 F.3d at 956 (quoting *Abbott Labs.*, 387 U.S. at 149, citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir.), *opinion modified on reh'g on other grounds*, 293 F.3d 537 (D.C. Cir. 2002)); *see Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 49 (D.C. Cir. 2000) (case ripe for judicial review where "questions presented are purely legal" and "[n]othing . . . would bring the issues into greater focus or assist in determining them"). The "prospect" of hardship is sufficient to make a claim fit for judicial review. *Id.* Moreover, the focus of the second prong of the ripeness inquiry - "hardship" to the parties from withholding review - is not whether they have suffered any "direct hardship," but rather whether *postponing* judicial review would impose an undue burden on them or would benefit the court. *AT&T v. FCC*, 349 F.3d 692, 700, 702 (D.C. Cir. 2003) (explaining that " 'hardship prong' " considers "potential hardship of delay on the [petitioner]" only if court finds important agency interests and rejecting petitioner's challenge as unripe because "both the agency and the court would benefit from postponing review" and petitioner failed to show that postponing review would cause it hardship); *see Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (ripeness *vel non* weighs "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues

presented"). Accordingly, because the Notice sufficiently affected their legal rights as well as the obligations of the FAA and because there was no reason to postpone judicial review, the appellants' claim was ripe in 1993.

Our recent decision in *Norwest Bank Minnesota National Association v. FDIC*, 312 F.3d 447 (D.C. Cir. 2002), also supports affirmance. In *Norwest*, we considered whether the FDIC's 1992 interpretation applying a statutory amendment to the calculation of banking insurance premiums triggered 12 U.S.C. 1817(g)'s five-year statute of limitations. *See id.* at 449-50. Rejecting the bank's claim that it could not have challenged the agency's interpretation until 1995, at which time the FDIC's interpretation imposed a financial burden on the bank itself, we concluded that "it has long been settled that statutes of limitations begin running *when the wrong has been committed*, even if at the time no more than nominal damages may be proved, and no more recovered." *Id. at 452* (emphasis added) (internal quotation omitted).[6] Just as the FDIC's 1992 interpretation constituted final agency action for the purpose of the bank's challenge - even if the FDIC's interpretation did not financially harm the bank until some years later - so too did the 1993 Recruitment Notice, which likewise determined the appellants' future salaries - notwithstanding their pocketbooks did not feel it until years later-constitute final agency action for the purpose of the appellants' APA claim here. *Norwest*, 312 F.3d at 451-52.

---

6. We noted that "[o]ne of the policies underlying the statute of limitations is repose[,]" concluding that if the statute of limitations did not begin to run until FDIC's interpretation caused financial harm to Norwest, "FDIC's books would never close." *Id.* at 452 (citing *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994)).

For the foregoing reasons, the judgment of the district court is affirmed.[7]

So ordered.

---

7. The district court dismissed the suit pursuant to Fed. R. Civ. P. 12(b)(1). We have previously declared that section 2401(a), "[u]nlike an ordinary statute of limitations, . . . is a jurisdictional condition attached to the government's waiver of sovereign immunity," *Spannaus v. United States Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987). Nevertheless, after the Supreme Court in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), rejected the Fifth Circuit's jurisdictional reading of Title VII's similar filing deadline and instead held that the "same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States," we recently expressed doubt about the jurisdictional nature of an analogous statute of limitations. *See Chung v. United States Dep't of Justice*, 333 F.3d 273, 277 (D.C. Cir. 2003) (rejecting jurisdictional nature of Privacy Act statute of limitations in light of *Irwin*); *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("filing a timely charge of discrimination . . . is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); *Leavell v. Kieffer*, 189 F.3d 492, 494-95 (7th Cir. 1999) (statute of limitations not jurisdictional but instead affirmative defense). The parties have not questioned the district court's dismissal pursuant to 12(b)(1), and, given our disposition, we need not determine whether the dismissal should have been pursuant to 12(b)(1) or 12(b)(6).

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED AUGUST 29, 2002

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-0503 (RMU)

Document Nos.: 25, 28

ROBERT HARRIS *et al.*,

Plaintiffs,

v.

FEDERAL AVIATION ADMINISTRATION,

Defendant.

MEMORANDUM OPINION

GRANTING THE DEFENDANT'S MOTION TO DISMISS; DENYING AS MOOT THE PLAINTIFFS' CROSS-MOTION FOR ADDITIONS TO THE ADMINISTRATIVE RECORD

I. INTRODUCTION

On August 9, 1981, President Reagan fired more than 11,000 air traffic controllers for participation in an illegal strike and banned the Federal Aviation Administration

("the FAA" or "the defendant")[1] from rehiring them. This case deals with the FAA's implementation of President Clinton's August 12, 1993 directive to repeal this historic ban. The plaintiffs are certified professional air traffic controllers whom the FAA fired in 1981 and then rehired pursuant to President Clinton's directive. The plaintiffs argue that the FAA's decision to rehire all fired controllers at the GS-9 pay grade level violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*

This matter is currently before the court on the defendant's motion to dismiss for lack of subject-matter jurisdiction or, in the alternative, for summary judgment, and on the plaintiffs' cross-motion for additions to the administrative record. The defendant argues that the statute of limitations bars the plaintiffs claim. For the reasons that follow, the court grants the defendant's motion to dismiss, determining that the court lacks subject-matter jurisdiction, and denies as moot the plaintiffs' cross-motion.

II. BACKGROUND

In 1981, President Reagan banned from FAA employment all air traffic controllers who were members of the Professional Air Traffic Controllers Organization

1. The plaintiffs assert that they properly amended their complaint to add the Department of Transportation ("DOT") as a defendant. Pls.' Opp'n and Cross-Motion for Additions to the Amin. R. ("Pls.'s Opp'n") at 2. Though the plaintiffs' motion to add parties demonstrates an intent to add a defendant, the First Amended Complaint neither lists nor describes the DOT as a defendant. Pls. Mot. to Add Pls. and Def.; First Am. Compl. ("Compl.") at 16 (case caption) & ¶ 3 (description of parties).

("PATCO") and who were found to have participated in a labor strike. Compl. at 18. Twelve years later, on August 12, 1993, President Clinton issued a directive that rescinded the ban. *Id.* at 18. The FAA subsequently published Recruitment Notice 93-01, offering to rehire the controllers at the GS-2152-9 ("GS-9") pay grade level. A.R. at 14-16 (press releases regarding the recruitment notice), 26 (Recruitment Notice 93-01).[2] According to the plaintiffs, the FAA re-hired them, beginning in January 1995, at the GS-9 level, despite the fact that many of the controllers had pay grades higher than GS 9 when the FAA dismissed them in 1981. *Id.* at 20.

On March 8, 2001, the plaintiffs filed a complaint alleging that the defendant acted arbitrarily, capriciously, and contrary to FAA policy by hiring the reinstated controllers at the GS-9 level. *Id.* at 20. The defendant moves to dismiss for lack of subject-matter jurisdiction or, in the alternative, for summary judgment. Def.'s Mot. to Dismiss or for Summ. J. ("Def.'s Mot. to Dismiss") at 1. The defendant argues that the issuance of the recruitment notice in 1993 is the final agency action that triggered the six- year statute of limitations for the plaintiffs' claim and that as a result, the statute of limitations expired in 1999. Def.'s Mot. to Dismiss at 15. In contrast, the plaintiffs contend that the actual rehiring at the GS-9 level, which began in 1995, constitutes the administrative action that triggered the statute of limitations. Pls.' Opp'n at 2. The plaintiffs also move to supplement the administrative record. *Id.* at 1. Because the statute of limitations bars the plaintiffs' claim, the court grants the defendant's motion to dismiss for lack of subject-matter

2. Though the recruitment notice is not dated, it lists an opening date of September 1, 1993. A.R. at 26.

jurisdiction. Consequently, the court has no jurisdiction to address the defendant's motion for summary judgment or the plaintiffs' cross-motion.

III. ANALYSIS

A. Legal Standard for a Motion to Dismiss

On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. *Dist. of Columbia Ret. Bd. v. United States*, 657 F. Supp. 428, 431 (D.D.C. 1987). In evaluating whether subject-matter jurisdiction exists, the court must accept all of the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The court need not, however, accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations. *E.g.*, *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990).

Moreover, the court need not limit itself to the allegations of the complaint. *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, the court may consider such materials outside the pleadings as it deems appropriate to determine whether it has jurisdiction over the case. *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).

Appendix B

B. The Court Grants the Defendant's Motion to Dismiss Because the Statute of Limitations Bars the Plaintiffs' Claim

The plaintiffs address the statute of limitations issue by discussing both when an agency action is final, and when an action is ripe for review. After considering both approaches to this statute of limitations issue, the court concludes that the plaintiffs' claim accrued and became ripe in 1993 when the FAA issued the Recruitment Notice. *Impro Prods., Inc., v. Block*, 722 F.2d 845, 850 (D.C. Cir. 1983). Thus, the six-year statute of limitations bars the plaintiffs' claim.

1. The 1993 Recruitment Notice Is a Final Agency Action Pursuant to the APA

A plaintiffs must bring an APA claim within six years after the claim first accrues. 28 U.S.C. § 2401; *Impro Prods.*, 722 F.2d at 850. Pursuant to the APA, a cause of action first accrues when a plaintiff may challenge a final agency action in court. 5 U.S.C. § 704; *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000). An agency action includes "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Furthermore, an agency rule "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . of an agency and includes the approval or *prescription for the future of rates, [or] wages* . . . ." 5 U.S.C. § 551(4) (emphasis added).

Appendix B

The D.C. Circuit has defined two conditions that an agency action must meet to be final: "First, the action must mark the 'consummation' of the agency's decision-making process . . . [and] second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' "[3] *Barrick Goldstrike Mines*, 215 F.3d at 48 (citations omitted). Furthermore, the D.C. Circuit has explained that an agency action that merely reiterates or affirms an earlier agency decision and does not affect the rights or alter the status quo of the complaining party is not considered a "final agency action," and, as such, does not trigger the statute of limitations under the APA. *Impro Prods.*, 722 F.2d at 850; *Kennecott Utah Copper v. Dep't of Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996). For example, in *Impro Products*, the court held that a letter, published by the U.S. Department of Agriculture ("USDA") in response to an inquiry from Impro, that *affirmed* the Department's earlier action—a decision to disseminate test results by publishing them in a journal—did not constitute a "final agency action." *Impro Prods.*, 722 F.2d at 850. Rather, the earlier decision to publish the results was the final action. *Id.*

---

3. When an administrative remedy is mandatory, a cause of action does not accrue until the party has exhausted all administrative remedies. *Spannaus v. Dep't of Justice*, 824 F.2d 52, 57 (D.C. Cir. 1987). The plaintiffs argue that no administrative remedies were available to the plaintiffs, while the defendant argues that such remedies were available and the plaintiffs failed to exhaust them. Pls.' Opp'n at 7; Def.'s Mot. to Dismiss at 19. Because the court lacks subject-matter jurisdiction over this case, it does not reach the administrative remedy issue.

Appendix B

In the present case, the Recruitment Notice issued by the defendant constitutes the final agency action that triggered the statute of limitations period. A.R. at 26-28; *Barrick Goldstrike Mines*, 215 F.3d at 48; 5 U.S.C. § 551(4). The Notice reads in relevant part:

> SERIES/GRADE/SALARY: GS-2152-09 ($27,789 $31,123 per annum). Salary will be within the above range, based on the applicant's previous Federal pay rate and agency pay-setting guidelines.
>
> AREA OF CONSIDERATION: Reinstatement and transfer eligible applicants who were separated from the Federal Aviation Administration as a result of the Professional Air Traffic Control Organization (PATCO) job action of 1981.

A.R. at 26. The Notice interprets the rehiring policy directed by the President,[4] demonstrates the FAA's decision to rehire the former controllers at the GS-9 salary level, and implements this final decision. *Id.* at 1, 26-28. Consequently, the Notice constitutes a final agency action. 5 U.S.C. § 551(4); *Barrick Goldstrike Mines*, 215 F.3d at 48.

The plaintiffs argue that the act of rehiring the plaintiffs represents the accrual of the final agency action. Pls.' Opp'n at 6. To the contrary, the separate action of rehiring controllers at the GS-9 level constitutes only an affirmation of this policy

---

4. President Clinton's memorandum of August 12, 1993 does not mention pay grades. A.R. at 1. It only states that the formerly banned air traffic controllers "will be eligible to apply for employment with the FAA." *Id.*

similar to the affirmation in *Impro Products. Impro Prods.*, 722 F.2d at 850. Just as the USDA's letter affirming an earlier final action did not create a new final action in *Impro Products*, the FAA's implementation of its policy by hiring the plaintiffs does not create a new agency action. *Id.* The 1993 Recruitment Notice was an offer of employment at GS-9. Pls.' Opp'n at 6. The hiring of the plaintiffs merely represents agency officials carrying out the offer set forth in the 1993 Notice. When or whether the plaintiffs were rehired is irrelevant to this agency review action, because the plaintiffs are challenging the FAA's 1993 decision to rehire them at GS-9 and not the FAA's specific decision to rehire each individual. In sum, the plaintiffs' argument that their action accrued at the time of the rehiring fails, the statute of limitations bars their claim, and, thus, the court lacks jurisdiction over this case. *Barrick Goldstrike Mines*, 215 F.3d at 48.

2. The Plaintiffs' Claims Became Ripe when the FAA Issued the 1993 Recruitment Notice

Though the plaintiffs concede that the 1993 Recruitment Notice was an *offer* of employment, the plaintiffs argue that their claim became ripe for judicial review only once they actually were rehired by the FAA. Pls.' Opp'n at 6 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977)). In *Abbott Laboratories*, which the plaintiffs rely on,[5] the Court actually held that an APA challenge to a policy issued by the Commissioner of Food and Drugs was ripe for adjudication

5. The plaintiffs and defendants rely on many the same cases but interpret the cases differently.

because the policy "purport[ed] to give an authoritative interpretation of a statutory provision," even though the Commissioner had not yet enforced the policy. *Id.* Likewise, in another case that the plaintiffs cite, the First Circuit recently relied in part on this ruling in *Abbott Laboratories* and concluded that an FAA notice that interpreted a regulation regarding pilot and crew rest periods and promised enforcement of the regulation was ripe for review at the time the notice was issued, rather than at a point when the FAA actually enforced the regulation, because its directive was clear. *Aviators for Safe and Fairer Regulation, Inc. v. Fed. Aviation Admin.*, 221 F.3d 222, 225-26 (1st Cir. 2000). Accordingly, to determine whether an agency action is ripe for judicial review, courts must consider whether the agency frames a rule or order in clear terms or in "terms so general that only its application to specific facts (usually in an enforcement proceeding) would permit the court to make a reasoned judgment." *Id.* at 226.

In the present case, the ruling framed in Recruitment Notice, that the FAA would rehire PATCO controllers at the GS-9 level, presents terms specific enough that a court could have made a reasoned judgment about the ruling had the plaintiffs challenged the policy before the FAA actually rehired any controllers. *Id.* at 225-26; A.R. at 26. Like the rest period notice in *Aviators*, the Recruitment Notice is a final action, and therefore ripe, once issued, not once implemented or enforced. *Id.* Therefore, the plaintiffs' claim became ripe when the FAA published the 1993 Recruitment Notice.

In conclusion, because the FAA issued the Recruitment Notice in 1993, the statute of limitations expired six years later, in 1999. A.R. at 14-16, 26; 28 U.S.C. § 2401. The plaintiffs did not commence this action until March 8, 2001. Thus, the court lacks subject-matter jurisdiction over the plaintiffs' claim and dismisses this action. *Dist. of Columbia Ret. Bd.*, 657 F. Supp. at 431.

IV. CONCLUSION

For all these reasons, the court grants the defendant's motion to dismiss and denies as moot the plaintiffs' cross-motion for additions to the administrative record. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this 29 day of August 2002.

s/ Ricardo M. Urbina
Ricardo M. Urbina
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-0503

Document Nos.: 25, 28

ROBERT HARRIS *et al.*,

Plaintiffs,

v.

FEDERAL AVIATION ADMINISTRATION,

Defendant.

ORDER

GRANTING THE DEFENDANT'S MOTION TO DISMISS; DENYING AS MOOT THE PLAINTIFFS' CROSS-MOTION FOR ADDITIONS TO THE ADMINISTRATIVE RECORD

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously issued this 29 day of August 2002, it is

ORDERED that the defendant's motion to dismiss is **GRANTED**, and it is

Appendix B

FURTHER ORDERED that the plaintiffs' cross-motion for additions to the administrative record is **DENIED as moot.**

SO ORDERED.

s/ Ricardo M. Urbina
Ricardo M. Urbina
United States District Judge

(3)

SUPREME COURT, U.S.
FILED
MAR 14 2004
CLERK

No. 03-1418

In the Supreme Court of the United States

ROBERT HARRIS, ET AL., PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

WILLIAM KANTER
CHRISTINE N. KOHL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioners, who were dismissed from their positions as Federal Aviation Administration (FAA) air traffic controllers in 1981, and who were re-hired by the FAA between 1995 and 1998, are entitled to sue in district court under the Administrative Procedure Act to challenge the FAA's decision to re-employ them at grade level GS-9 rather than at a higher grade level.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967)	5
Barnhart v. *Devine*, 771 F.2d 1515 (D.C. Cir. 1985)	7
Bay Area Laundry & Dry Cleaning Pension Trust Fund v. *Ferbar Corp.*, 522 U.S. 192 (1997)	10
FTC v. *Standard Oil Co.*, 449 U.S. 232 (1980)	9
Hinkel v. *England*, 349 F.3d 162 (3d Cir. 2003)	7
Houlihan v. *OPM*, 909 F.2d 383 (9th Cir. 1990)	7
Lindahl v. *OPM*, 470 U.S. 768 (1985)	6
Reno v. *Catholic Social Servs.*, 509 U.S. 43 (1993)	11
Stella v. *Mineta*, 284 F.3d 135 (D.C. Cir. 2002)	9
Toilet Goods Ass'n v. *Gardner*, 387 U.S. 158 (1967)	9
Towers v. *Horner*, 791 F.2d 1244 (5th Cir. 1986)	7
United States v. *Fausto*, 484 U.S. 439 (1988)	6

Statutes and regulation:

Administrative Procedure Act, 5 U.S.C. 704	3, 4
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111	3
Classification Act of 1949, ch. 782, 63 Stat. 954 (5 U.S.C. 5101 *et seq.*)	6
5 U.S.C. 5102	6
5 U.S.C. 5112(b)	7
	7

Statutes and regulation—Continued: Page

Department of Transportation and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-50, § 347, 109 Stat. 436 8
Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, § 253, 110 Stat. 3237 8
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, Tit. III, 114 Stat. 115:
§ 307(a), 114 Stat. 124 8
§ 307(d), 114 Stat. 125 8
§ 308, 114 Stat. 126 8
5 U.S.C. 1214(a)(1)(A) 7
5 U.S.C. 1214(a)(2)(A) 8
5 U.S.C. 1214(a)(3) 8
5 U.S.C. 1214(b)(2)(C) 7
5 U.S.C. 1214(c) 7
5 U.S.C. 1221 8
5 U.S.C. 2302(a)(1) 7
5 U.S.C. 2302(b) 8
5 U.S.C. 2302(b)(8) 8
5 U.S.C. 7703(b) 7
28 U.S.C. 1295(a)(9) 7
28 U.S.C. 2401(a) 3, 10
49 U.S.C. 40122 8
49 U.S.C. 40122(g)(1) 9
49 U.S.C. 40122(g)(2) 7
49 U.S.C. 40122(g)(2)(H) 8
5 C.F.R. 511.603(a)(1) 7

Miscellaneous:

<http://www.faa.gov/ahr/policy/PMS/personel.htm> 8

In the Supreme Court of the United States

No. 03-1418

ROBERT HARRIS, ET AL., PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 353 F.3d 1006. The opinion of the district court (Pet. App. 14a-23a) is reported at 215 F. Supp. 2d 209.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2004. The petition for a writ of certiorari was filed on April 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1981, President Reagan fired more than 11,000 air traffic controllers because of their participation in an illegal strike organized by the Professional

Air Traffic Controllers Organization (PATCO). As a result of that unlawful job action, the controllers were barred from future employment with respondent Federal Aviation Administration (FAA). Pursuant to a subsequent directive issued by the Office of Personnel Management (OPM), the discharged employees were also barred from air traffic controller and related positions at specified Department of Defense facilities. In August 1993, President Clinton issued a directive lifting the lifetime ban on FAA employment. Later that month, the FAA implemented that directive by issuing Recruitment Notice 93-01, which invited controllers who were fired in 1981 as a result of the illegal job action to apply for air traffic controller positions. Pet. App. 1a-3a & n.1, 14a-16a & n.2; C.A. App. 25-27, 53-55.

Recruitment Notice 93-01 established an opening date of September 1, 1993, and a closing date of October 15, 1993, for applications pursuant to the Notice. C.A. App. 53. The Notice explained that "[t]he FAA is establishing an inventory of applicants who have reinstatement and transfer eligibility" and that "[e]ligible candidates will be ranked as vacancies occur on the basis of job-related criteria." *Ibid.* The Notice stated that the salary of any applicants rehired "will be within" the GS-9 range (at that time $27,789-$36,123 per year), and that promotion above that level "will be based upon successful completion of training and/or certification requirements for the next higher grade and applicable time-in-grade requirements." *Ibid.* The GS-9 level was chosen because 12 years had elapsed since the controllers had been fired, and any applicants who were re-hired would need "training to learn new air traffic control systems." Pet. App. 4a. The Recruitment Notice cautioned that "[b]ased on projected vacancies, the FAA expects to fill only a small

number of [air traffic controller] positions from a variety of sources over the next few years. As a result, employment opportunities are limited; there is no guarantee that candidates will be referred or selected." C.A. App. 53.

2. Petitioners were among the air traffic controllers fired in 1981. Pet. App. 2a. They applied for re-employment in 1993 pursuant to Recruitment Notice 93-01 and were re-hired as FAA air traffic controllers at the GS-9 level beginning in January 1995. *Id.* at 4a & n.2, 16a. On March 8, 2001, petitioners filed suit in federal district court under the Administrative Procedure Act (APA), 5 U.S.C. 704, claiming that the FAA's decision to re-hire PATCO controllers at the GS-9 level was arbitrary and capricious, and that such individuals should have been re-hired at their pre-termination grade levels. Pet. App. 4a, 16a. The complaint, which was subsequently amended to add additional parties, sought declaratory relief and an order directing the FAA to adjust petitioners' pay grades. See First Amended Comp. 22-23 (filed Oct. 18, 2001).

The government moved to dismiss the complaint on several alternative grounds. See Pet. App. 5a (listing bases for dismissal asserted by the government in the court of appeals). *Inter alia*, the government argued that petitioners' claims were barred by the six-year statute of limitations in 28 U.S.C. 2401(a), and that petitioners had failed to utilize the exclusive remedies available under the comprehensive scheme governing federal personnel actions set forth in the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111. The district court granted the government's motion to dismiss, ruling that the claims were time-barred because petitioners had filed suit more than six years after their cause of action accrued. The court did

not address the other grounds for dismissal asserted by the government. Pet. App. 14a-23a.

In holding that petitioners' claims were untimely filed, the district court found that Recruitment Notice 93-01 "constitutes the final agency action that triggered the statute of limitations period." Pet. App. 20a. The court rejected petitioners' contention "that the act of rehiring the [petitioners] represents the accrual of the final agency action." *Ibid.* The court stated that "[w]hen or whether the [petitioners] were rehired is irrelevant to this agency review action, because the [petitioners] are challenging the FAA's 1993 decision to rehire them at GS-9 and not the FAA's specific decision to rehire each individual." *Id.* at 21a.

The district court also rejected petitioners' contention "that their claim became ripe for judicial review only once they actually were rehired by the FAA." Pet. App. 21a. The court stated that "the ruling framed in Recruitment Notice [93-01], that the FAA would rehire PATCO controllers at the GS-9 level, presents terms specific enough that a court could have made a reasoned judgment about the ruling had the [petitioners] challenged the policy before the FAA actually rehired any controllers." *Id.* at 22a. The court held on that ground that petitioners' claims "became ripe when the FAA published the 1993 Recruitment Notice." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-13a.

The court of appeals held that Recruitment Notice 93-01 was a reviewable "final agency action" within the meaning of 5 U.S.C. 704. Pet. App. 6a-9a. The court explained that, although Recruitment Notice 93-01 "qualified the date, if ever, on which a former [air traffic] controller might be hired," the Notice "stated categorically that, when such hiring occurred pursuant to the Notice, it would be at the GS-9 grade level and at

a corresponding salary." *Id.* at 7a-8a. In the court's view, "[t]he hiring of the [petitioners] from 1995 to 1998 at the GS-9 level simply implemented the FAA's decision which was made in 1993 and spelled out in the Notice." *Id.* at 9a.

The court of appeals also held that an APA challenge to the pay-grade determination set forth in Recruitment Notice 93-01 would have been ripe for immediate judicial review when the Notice was issued in 1993. Pet. App. 10a-12a. The court observed that "[t]he ripeness inquiry requires a court to look both to 'the fitness of the issues for judicial review and the hardship to the parties of withholding court consideration.'" *Id.* at 10a (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967)). The court found that an immediate challenge to the Notice would have been fit for judicial review because petitioners' claim of arbitrary and capricious agency conduct raised a "purely legal question." *Id.* at 11a. The court rejected petitioners' contention (see *id.* at 10a-11a) that, because they suffered no "direct hardship" from the agency's pay-grade determination until they were re-hired by the FAA and their own salaries were calculated, a challenge to the Notice would not have been ripe at the time of its issuance in 1993. The court stated that "[t]he 'prospect' of hardship is sufficient to make a claim fit for judicial review." *Id.* at 11a. The court of appeals concluded that "because the Notice sufficiently affected their legal rights as well as the obligations of the FAA and because there was no reason to postpone judicial review, the [petitioners'] claim was ripe in 1993." *Id.* at 12a.

ARGUMENT

Petitioners contend (Pet. 6-25) that the court of appeals erred in holding that an immediate challenge to

the pay-grade determination set forth in Recruitment Notice 93-01 would have been ripe for judicial review. Further review of that ripeness question is not warranted because the Court's resolution of the issue would not affect the outcome of petitioners' suit. Whether the suit is regarded as a challenge to FAA decisions concerning the salaries to be paid to individual agency employees, or as a challenge to the general agency policy determination reflected in the 1993 Notice, petitioners' complaint was properly dismissed.

1. If petitioners' suit is treated as a challenge to individual FAA classification and salary determinations, their claims are subject to the exclusive remedial scheme established by the CSRA. Enacted in 1978, the CSRA "comprehensively overhauled the civil service system." *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985). "A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action" that had existed under prior law. *United States* v. *Fausto*, 484 U.S. 439, 444 (1988). The Act "replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 445. If the CSRA itself does not authorize judicial review of a particular personnel decision, the appropriate conclusion is that review of the decision is precluded. See *id.* at 448-449.

A contention that a federal agency has acted arbitrarily and capriciously in determining the GS level for a particular position or employee is properly treated as a "classification" dispute. See Classification Act of 1949, ch. 782, 63 Stat. 954, as amended, 5 U.S.C. 5101 *et seq.* Neither the CSRA nor any other federal statute

specifically authorizes judicial review of an agency's classification decisions.[1]

However, to the extent that a classification determination is associated with or is alleged to constitute a "prohibited personnel practice," 5 U.S.C. 2302(a)(1), the CSRA allows the affected employee to file a complaint with the Office of Special Counsel (OSC). 5 U.S.C. 1214(a)(1)(A).[2] The OSC may pursue the matter before the Merit Systems Protection Board (MSPB or Board), 5 U.S.C. 1214(b)(2)(C), and, if the employee is adversely affected by the MSPB decision, he may seek judicial review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 1214(c), 7703(b); 28 U.S.C. 1295(a)(9). With the exception of certain cases involving alleged agency reprisals for "whistleblowing"

---

[1] As a general matter, an employee affected by an agency's classification decision "may request at any time" that OPM review that decision. 5 U.S.C. 5112(b); see 5 C.F.R. 511.603(a)(1). The Classification Act's definition of "agency" encompasses the FAA. See 5 U.S.C. 5102. Under 49 U.S.C. 40122(g)(2), however, the FAA's personnel management system is subject only to specified portions of Title 5, which do not include the provisions of the Classification Act. See p. 8, *infra*. In any event, the petitioners in this case did not invoke Section 5112(b) or seek OPM review of the FAA's classification decisions.

[2] The courts of appeals have frequently treated classification disputes as raising allegations of prohibited personnel practices. See, *e.g.*, *Hinkel* v. *England*, 349 F.3d 162, 165 (3d Cir. 2003) ("Courts that have addressed the interplay between the Classification Act and the CSRA have concluded that classifications running afoul of the Classification Act qualify as 'prohibited personnel actions' and therefore are subject to" OSC review under the CSRA.); *Houlihan* v. *OPM*, 909 F.2d 383, 384 (9th Cir. 1990) ("A misclassification of a federal employment position is a 'prohibited personnel practice' as that term is defined in the CSRA."); *Towers* v. *Horner*, 791 F.2d 1244, 1247 (5th Cir. 1986); *Barnhart* v. *Devine*, 771 F.2d 1515, 1518 n.3, 1523 & n.12 (D.C. Cir. 1985).

activities, see 5 U.S.C. 1214(a)(3), 1221, 2302(b)(8), the employee has no further administrative or judicial recourse if the OSC declines to pursue the complaint before the MSPB. See 5 U.S.C. 1214(a)(2)(A).

Both now and at the time when petitioners' complaint was filed, the FAA's personnel practices have been subject to a hybrid legal regime that combines features of the CSRA with a Personnel Management System devised by the FAA itself pursuant to statutory authorization. See 49 U.S.C. 40122. Under that regime, the FAA is exempt from much of Title 5 but is subject to the CSRA provisions that govern the filing of complaints with the OSC and subsequent review by the MSPB. See 49 U.S.C. 40122(g)(2)(H). The FAA Personnel Management System (see, *e.g.*, <http://www.faa.gov/ahr/policy/PMS/personel.htm>) contains a list of "prohibited personnel practices" that largely tracks the list set forth in 5 U.S.C. 2302(b). Thus, as with workers in other federal agencies, an FAA employee who is adversely affected by a personnel practice prohibited by the FAA Personnel Management System may file a claim with the OSC, which may in turn seek review in the MSPB. If the OSC declines to file a claim with the Board, judicial review is not available; if the OSC does file such a claim, the employee may seek review of the MSPB's decision in the Federal Circuit.[3]

---

[3] Through legislation enacted in 1995, 1996, and 2000, Congress revised federal personnel law as it applies to FAA employees. See Department of Transportation and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-50, § 347, 109 Stat. 436; Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, § 253, 110 Stat. 3237; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, Tit. III, §§ 307(a) and (d), 308, 114 Stat. 124, 125, 126. As a result of those statutory revisions, the CSRA provisions governing OSC and MSPB review

In the instant case, petitioners did not file a complaint with the OSC. Even if petitioners had exhausted their OSC remedies, moreover, the judicial review that is potentially available to address a "prohibited personnel practice" is by way of a petition for review in the Federal Circuit (if the OSC pursues a claim before the MSPB and the employee is adversely affected by the Board's decision), not through an APA action filed in district court. Thus, if this suit is properly regarded as a challenge to FAA classification decisions concerning individual re-employed air traffic controllers, petitioners' APA claims are precluded by the exclusive remedial scheme established by the CSRA.

That is so, moreover, even if the gravamen of petitioners' challenge is that the individual classification decisions are invalid because they were made on the basis of an arbitrary or unreasonable general rule. Where case-specific application of an agency rule is a prerequisite to the assertion of a ripe, justiciable claim, any judicial review occurs under the procedural regime that governs challenges to the relevant category of individualized agency determinations. See, *e.g.*, *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 165 & n.3 (1967); cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 245 (1980). Thus, if petitioners' challenge to the general pay-grade determination reflected in Recruitment Notice 93-01

---

were inapplicable to the FAA for a period of time between 1996 and 2000. See *Stella* v. *Mineta*, 284 F.3d 135, 142-143 (D.C. Cir. 2002). The *prior* unavailability of OSC and MSPB review, however, cannot reasonably be thought to provide a basis for petitioners' APA action filed in March 2001. That is particularly clear in light of the fact that the statutorily defined objective of the FAA's Personnel Management System is to "provide for greater flexibility in the hiring, training, compensation, and location of personnel." 49 U.S.C. 40122(g)(1).

became ripe only through its application to individual FAA re-hirees, petitioners cannot avoid the CSRA's restrictions on challenges to agency classification decisions.

2. The courts below did not rely on the CSRA as a basis for dismissal of petitioners' suit. Rather, they held that the FAA's decision to re-hire former PATCO controllers at a GS-9 level was definitively announced in Recruitment Notice 93-01; that an APA challenge to that Notice would have been ripe for judicial review when the Notice was issued; and that petitioners' claims therefore accrued at that time. See Pet. App. 6a-12a, 18a-23a Because the instant suit was commenced in March 2001, more than six years after the Recruitment Notice was issued in August 1993, the courts below concluded that the suit was barred by the applicable statute of limitations. See *id.* at 5a-12a, 23a; 28 U.S.C. 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").

In contesting the court of appeals' holding that this suit was time-barred, petitioners argue that their legal challenge did not become ripe for judicial review until the general classification decision reflected in Recruitment Notice 93-01 was applied to particular re-hirees, and that their claims consequently did not accrue until that time. Cf. *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 195 (1997) ("A limitations period ordinarily does not begin to run until the plaintiff has a complete and present cause of action.") (internal quotation marks omitted). At least by that point, however, any challenge could have been brought only pursuant to the comprehensive and exclusive review provisions of the CSRA, not in an

APA suit in district court. Compare *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43, 60 (1993).

Thus, if petitioners' challenge to Recruitment Notice 93-01 could be brought in district court under the APA at all, it was required to be brought independently and in advance of any individual hiring decision. Petitioners argue that any such challenge would have been unripe. That contention does not warrant this Court's review, however, because it arises in the context of the special jurisdictional regime of the CSRA and because the Court's resolution of the ripeness question would not affect the ultimate disposition of the case. If petitioners are correct that their claims became ripe only when individual PATCO controllers were re-hired by the FAA and their starting salaries were established, then, as explained above, petitioners' suit is foreclosed because they have no legitimate ground for bypassing the CSRA's comprehensive review procedures and instead seeking relief in district court under the APA. Nor could petitioners avoid dismissal of their claims by characterizing this suit as a facial challenge to Recruitment Notice 93-01. Assuming (as the court of appeals held) that a facial challenge to the Notice would have been ripe for judicial review, and that it would not have been barred by the CSRA, any such facial challenge was required to be filed within six years after the Notice was issued. Petitioners' APA suit was therefore subject to dismissal, whether that suit is treated as a challenge to the FAA's salary determinations with respect to individual FAA employees, or as a facial challenge to the Notice itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

WILLIAM KANTER
CHRISTINE N. KOHL
Attorneys

JULY 2004

(2)

Supreme Court, U.S.
FILED
JUL 22 2004
OFFICE OF THE CLERK

No. 03-1418

IN THE

Supreme Court of the United States

ROBERT HARRIS, *et al.*,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION and JANE F. GARVEY, Administrator of the Federal Aviation Administration, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

Of Counsel:

JONATHAN R. SIEGEL
Professor of Law
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 H. Street, NW
Washington, D.C. 20052
(202) 994-7453

JOEL C. GLANSTEIN
Counsel of Record
DAVID M. GLANSTEIN
O'DONNELL, SCHWARTZ, GLANSTEIN & LILLY, LLP
Attorneys for Petitioners
60 East 42nd Street
New York, NY 10165
(212) 370-5100

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
SINCE RESPONDENTS DO NOT DENY THE EXISTENCE OF A CONFLICT AMONG THE CIRCUIT COURTS ON THE QUESTIONS PRESENTED, AS WELL AS ERROR BY THE LOWER COURT, THE PETITION SHOULD BE GRANTED AND THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE SUMMARILY REVERSED	1
CONCLUSION	4

TABLE OF CITED AUTHORITIES

Page

CASES

Fellers v. United States,
124 S. Ct. 1019 (2004) 2

Lee v. Kemna,
534 U.S. 362 (2002) 3

I. SINCE RESPONDENTS DO NOT DENY THE EXISTENCE OF A CONFLICT AMONG THE CIRCUIT COURTS ON THE QUESTIONS PRESENTED, AS WELL AS ERROR BY THE LOWER COURT, THE PETITION SHOULD BE GRANTED AND THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE SUMMARILY REVERSED.

Respondents' brief in opposition to the petition for certiorari is a remarkable document. The government's opposition makes no effort to defend the decision of the D.C. Circuit on the questions presented by the petition. Nor do Respondents dispute Petitioners' demonstrations that this decision conflicts with decisions of other U.S. Circuit Courts of Appeals, or that the D.C. Circuit's holding was erroneous as a matter of law. Instead, Respondents' sole argument is that, even if this petition for a writ of certiorari is granted and the judgment below is reversed, the government might eventually prevail on grounds that were never addressed by the courts below.

The government's opposition demonstrates the need for this Court to grant certiorari. The clear implication of the government's failure to defend the Court of Appeals' decision is that even the government recognizes the error of the Court of Appeals' determination on the critical issue of ripeness in this matter. Moreover, the opposition does not even cite or address the cases from other circuits, identified in the petition for certiorari, that show that there is a conflict among the circuit courts of appeals with regard to determining ripeness of claims seeking review of agency action. Again, the clear implication is that even the government recognizes that there

is a conflict in the circuits on this important issue. This Court should grant certiorari to resolve the conflict.

Instead of addressing the questions presented by the petition, which originate from the issues actually addressed by the lower courts, the government inappropriately asks this Court to deny the petition based solely on its prediction that it will ultimately win the case on a different ground. The government suggests that the petitioners' claims are barred by the preclusive effects of the Civil Service Reform Act (CSRA). As the government acknowledges, *see* Opposition at 10, the courts below never ruled on this argument. Accordingly, the government can only claim that it believes it will win the case on this alternative ground even if this Court reverses and remands. Many respondents have such hopes, but under such circumstances, it is commonplace for this Court to decide only the issues actually presented by a petition, and then, if necessary, remand the case for further proceedings on other issues.[1]

Needless to say, petitioners strongly disagree with the government's CSRA argument. The short answer to this argument is that, during the time petitioners were rehired by the Federal Aviation Administration (which occurred

---

1. Just this past Term, for example, in *Fellers v. United States*, 124 S. Ct. 1019 (2004), this Court faced an analogous situation. It granted certiorari and determined that government agents' deliberate elicitation of statements from the petitioner had violated his rights under the Sixth Amendment, notwithstanding the possibility that, even if that were true, the government could win anyway, because the only statements actually admitted during petitioner's trial were subsequent statements made after a knowing and voluntary waiver of petitioner's right to counsel. This Court directed the court of appeals to consider that argument on remand. *Id.* at 1023.

between 1995 and 1998, *see* Petition at 4a), the agency had been statutorily exempted from the CSRA's coverage and its attendant personnel guidelines. The government acknowledges this fact. *See* Opposition at 8 n.3. It is particularly clear in petitioners' view that CSRA exclusivity cannot apply to agencies that are wholly outside the CSRA system. The government's assertion that some aspects of the CSRA once again covered the FAA at the time of petitioners' lawsuit, Opposition at 8, is unavailing and irrelevant. The relevant time is the time when petitioners were rehired by the agency, as this is when their hardship arose and rights to seek relief accrued, during which time they were statutorily exempt from the CSRA.

The real point, however, is not that the government's CSRA argument is incorrect (although it is), but that it is not this Court's practice to decide such issues in the first instance. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 388 (2002) ("We ordinarily do not decide in the first instance issues not decided below.") (internal quotation omitted). For the reasons stated in the petition for certiorari, this Court should grant the petition to decide the questions actually presented by the petition which were addressed by the lower courts. Indeed, given the government's failure to defend the court of appeals' decision on those questions, it would be appropriate for this Court to grant the petition and reverse the court of appeals' judgment summarily, without requiring

further briefing or argument. In any event, the question of CSRA exclusivity should be left to the lower courts' consideration on remand.

CONCLUSION

The petition for certiorari should be granted, the judgment summarily reversed, and the case remanded for further proceedings. In the alternative, the petition for certiorari should be granted.

Respectfully submitted,

JOEL C. GLANSTEIN
Counsel of Record
DAVID M. GLANSTEIN
O'DONNELL, SCHWARTZ,
GLANSTEIN & LILLY, LLP
Attorneys for Petitioners
60 East 42nd Street
New York, NY 10165
(212) 370-5100

Of Counsel:

JONATHAN R. SIEGEL
Professor of Law
George Washington University
Law School
2000 H. STREET, NW
WASHINGTON, D.C. 20052
(202) 994-7453